87-1199

No. 87-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ABACUS MORTGAGE INVESTMENT COMPANY,
Petitioner,

v.

SUTTON PLACE DEVELOPMENT COMPANY, a Florida corporation, Henry Weiss, and Carol Weiss,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below was correct to rule that the plaintiff's two successive dismissals of its action against petitioner avoided the bar of the two dismissal rule of Rule 41(a), Fed. R. Civ. P., because the second dismissal was achieved by a paper labeled "Motion," even though petitioner was sent no notice of that application, no hearing was held on it and it was, effectively, a unilateral withdrawal of the action.

2. Whether the court below, by improper emendation of Rule 41(a), enabled a plaintiff to have the advantage of a second dismissal of its complaint without incurring either the sanction of Rule 41(a)(1) or the safeguard against abuse provided by Rule 41(a)(2).

3. Whether the court below, by treating the issue as a "mixed question of law and fact", rather than a simple question of the intention of petitioner's counsel, erred in rejecting the district court's finding that petitioner had not waived reliance on the two-dismissal provision of Rule 41(a).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Abacus Mortgage Investment Company ("Abacus"),[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 12, 1987. Abacus' motion for rehearing with suggestion for rehearing *in banc* was denied on October 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the decision of Judge Prentice Marshall of the District Court for the Northern

1. Abacus Mortgage Investment Company was merged into Heller Financial, Inc. effective June 30, 1985. Throughout this and related litigation, petitioner has been know as "Abacus." For the sake of simplicity, petitioner will generally be denominated in this petition as "Abacus." Pursuant to Rule 28.1 of the Rules of the Court, the following is a list naming all parent companies, subsidiaries, (except wholly owned subsidiaries), and affiliates of petitioner Abacus:

> Abacus (Heller Financial, Inc.) is a wholly owned subsidiary of Heller Internation Corporation, a Delaware corporation, which is a wholly owned subsidiary of The Fuji Bank, Limited, a Japanese Bank.

District of Illinois is reported at 826 F.2d 637 (7th Cir. 1987), and appears as Appendix A to this petition. The decisions of the district court are unreported and appear as Appendix B to this petition.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 12, 1987. A timely petition for rehearing *in banc* was denied on October 22, 1987, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was based on 28 U.S.C. § 1332 and 18 U.S.C. § 1961 et seq. The jurisdiction of the court below was based upon 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure

Rule 41

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23 (e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court, (i) by filing a notice of dismissal at anytime before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the

court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 52(a)

Rule 52. Finding by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

I. Material Facts

This action is one of several that arose out of a failed condominium construction project. The complaint below was filed after two other complaints based on the same claim were dismissed.

Respondents, Sutton Place Development Company, Henry Weiss and Carol Weiss (collectively, "Sutton Place"), are all residents and citizens of the State of Florida. Abacus was, at all

relevant times, a Delaware corporation with its principal place of business in the State of Illinois.

In 1979, Sutton Place acquired the right to purchase approximately 12.5 acres of real estate in the City of Coral Springs in Broward County, Florida. The property was to be developed into a condominium complex which, if completed as contemplated, would have consisted of six condominium buildings with approximately 250 dwelling units and other amenities.

Abacus was the construction lender on the project and the Bank of Commerce and Industry ("BCI") was the real estate lender. On or about March 31, 1981, Sutton Place gave a note, secured by a mortgage, in the amount of $2,758,333.33, to Abacus.

Construction of the first part of the project, consisting of a 42 unit condominium building and a recreational facility, commenced in 1981 and was completed in June of 1982. The development was not successful. Abacus and BCI served Sutton Place with notices of default, arising, among other reasons, out of Sutton place's failure to pay interest on its note.

On January 6, 1983, when the mortgage note was in default, and prior to the foreclosure action by Abacus, Sutton Place instituted a civil action in the Circuit Court of Cook County, Illinois, entitled *Sutton Place Development Company, et al.* v. *Bank of Commerce & Industry, et al.* (the "Illinois case"). Among other things, the complaint sought to restrain Abacus from foreclosing on its defaulted mortgage on the property located in Florida. The trial judge did enter a temporary restraining order as Sutton Place requested, but that order was subsequently dissolved.

Once the restraining order was lifted, Abacus filed its foreclosure action in the Circuit Court of Broward County, Florida, entitled *Abacus Mortgage Investment Company* v. *Sutton Place Development Co., et al.* (the "Florida foreclosure"). Sutton Place then filed a counterclaim in the Florida foreclosure, alleging claims of wrongdoing similar to those alleged in the Illinois case, and similar to claims that would later be brought in two

other actions in the United States District Court for the Northern District of Illinois.

Meanwhile, the trial judge in the Illinois case had set a trial date of August 1, 1983 in the case pending before him. On Thursday, July 28, 1983, the eve of trial, Sutton Place elected to dismiss Abacus voluntarily from the Illinois case.

On Monday, August 1, 1983, the day set for the trial of the Illinois case against the remaining defendants, Sutton Place filed petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida. The bankruptcy proceeding was assigned to Bankruptcy Judge Gassen.

A few days before the filing of those petitions, on July 21, 1983, Sutton Place had filed the instant case against Harold Green and Donald Houder (a director and officer of BCI, respectively), and Bernard Grizaffi, a person not affiliated with BCI or Abacus. Abacus was not named as a party defendant in the initial complaint. Abacus was mentioned as a victim of fraudulent conduct. Paragraph 14 of that complaint alleged collusion by Green, Houder and Grizaffi to defraud Abacus. The instant case was assigned to Judge Prentice H. Marshall.

The filing of the bankruptcy petitions automatically stayed all actions against Sutton Place, including the Florida foreclosure and the Illinois case, where a BCI counterclaim was pending. No such ban prevented Sutton Place from instituting actions, however. On December 21, 1983, Sutton Place filed another lawsuit against Abacus, this time in the United States District Court for the Northern District of Illinois. This case, entitled *Sutton Place Development Co., et al.* v. *Abacus Mortgage Investment Company,* was designated No. 83 C 9368. Assigned to Judge James B. Moran (the "Judge Moran case"), this new complaint alleged a cause of action identical to that already brought in Sutton Place's counterclaim in the Florida foreclosure and was based upon the same underlying claims as had been brought, not only in the Florida foreclosure, but in the Illinois case as well.

Abacus did not appear in the Judge Moran case, although it had received a copy of the complaint. Instead, it moved before the Bankruptcy Court in Florida to enjoin Sutton Place from proceeding with the Judge Moran case because, among other reasons, the issues in the Judge Moran case were directly related to matters already pending before the Bankruptcy Court and also pending in the Florida foreclosure. On January 17, 1984, Bankruptcy Judge Gassen entered an order abating the proceedings before Judge Moran.

On February 2, 1984, Bankruptcy Judge Gassen entered another order, this one vacating the automatic stay as to Abacus in order to allow the Florida foreclosure to proceed in Broward County. Because Sutton Place claimed to have still more causes of action against Abacus, including the RICO cause of action eventually raised in the instant case, Judge Gassen further ordered Abacus:

> to join in any motion by debtors or any of them in the Action [the Florida foreclosure] to amend their pleadings addressed to Abacus to add claims against Abacus, and to stipulate to an order granting any such motion, provided any such motion is made within 20 days hereof.

Sutton Place filed no motion to amend its counterclaim in the Florida foreclosure within the time allowed by Judge Gassen.

Instead, in April, 1984, Sutton Place moved that Bankruptcy Judge Gassen vacate his Order enjoining the prosecution of the Judge Moran case to allow Sutton Place "to proceed" with that case. Abacus objected to the motion. When the motion was heard before Judge Gassen on April 18, 1984, counsel for Sutton Place then asserted that he wished to vacate the abatement order so that the Judge Moran case could be dismissed. He informed the Court that he had considered seeking to consolidate the Judge Moran case with the instant case, but that "the better procedure" was to seek voluntary dismissal. Judge Gassen was not informed of the dismissal of the Illinois case.

As a result of the April 18, 1984 hearing, Judge Gassen entered the following Order on April 20, 1984:

> IT IS ORDERED that this Court's Order of January 17, 1984 directing debtors to abate their action (the "Action") styled *Sutton Place Development Co., et al.* vs. *Abacus Mortgage Investment Company*, No. 83 C 9368 in the United States District Court, Northern District of Illinois, Eastern Division, is vacated solely to enable debtors to dismiss the Action. This Order is without prejudice to debtors' rights, including the assertion of the cause of action stated in the Action, in any litigation which is now pending.

On May 3, 1984, Sutton Place moved to dismiss voluntarily the Judge Moran case, without prejudice. See Appendix C. Abacus received no notice of that motion, and Sutton Place's motion did not refer to any stipulation between the parties to dismiss the Judge Moran case. Judge Moran, on that same day, issued a minute order granting the motion and dismissing Abacus for the second time from an action brought by Sutton Place based on the failed condominium project in Florida.

II. Proceedings Below

Almost three weeks later, on May 22, 1984, Sutton Place filed an amended complaint in the instant case, naming Abacus for the first time and alleging causes of action based upon the same claims as either had been considered or were pending in the Illinois case, the Florida foreclosure, the Florida Bankruptcy Court, and the Judge Moran case. Jurisdiction was asserted on diversity grounds, 28 U.S.C. § 1332, and the federal RICO statute, 28 U.S.C. § 1961 et seq.

On July 2, 1984, Abacus moved to dismiss the amended complaint as to it. Each count of the amended complaint was attacked on substantive grounds and the entire amended complaint was asserted to be defective under the "two dismissal" rule in Fed. R. Civ. P. 41(a)(1) because of the prior voluntary dismissals in the Illinois case and the Judge Moran case. Alternatively, Abacus urged Judge Marshall to dismiss or stay the instant case until the resolution of the same issues raised by Sutton Place

months earlier in the prior-pending Florida foreclosure. Meanwhile, within one week of the filing by Abacus of the motion to dismiss the new amended complaint in the United States District Court of the Northern District of Illinois, Sutton Place returned to Florida and sought to amend its counterclaim against Abacus in the Florida foreclosure. Sutton Place's motion was denied, with prejudice, by Order dated July 31, 1984, the proposed amendments coming over five months late under Judge Gassen's enabling Order of February 2, 1984. The issues concerning the dismissal of the instant case were fully briefed and, on February 25, 1985, Judge Marshall entered an Order and Memorandum Opinion granting Abacus' motion to dismiss based on the two dismissal rule. See Appendix B.

In March, 1985, Sutton Place sought reconsideration of Judge Marshall's Order. The issues raised by Sutton Place concerning reconsideration were also extensively briefed and were rejected by Judge Marshall in an Order and Memorandum Opinion dated September 10, 1985. Judge Marshall directed the entry of a judgment in favor of Abacus and against Sutton Place on September 18, 1985. See Appendix B.

On appeal, a divided Court of Appeal reversed the district court, holding that because the Judge Moran case was dismissed on Sutton Place's motion, rather than by notice, the case did not fit within the precise language of Rule 41(a)(1) and that therefore the "two dismissal" exception did not apply. Also, while agreeing with the district court that petitioner did not explicitly waive reliance on the two dismissal rule, the court below inconsistently ruled that the district court was clearly erroneous when it found no waiver. See Appendix A.

Senior Circuit Judge Eschbach dissented from the majority opinion, arguing that, however its papers may have been styled by Sutton Place, its dismissal of the Judge Moran case was in fact a dismissal by notice, and, being the second such dismissal, was with prejudice. Judge Eschbach further noted that Sutton Place had the burden of proving waiver by petitioner; that, as the trial court found, the record was "far from clear" that any waiver had

occurred; and thus Sutton Place had failed to meet its burden of proof to show that Judge Marshall's factual finding was clearly erroneous. See Appendix

A. A petition for rehearing *in banc* was subsequently denied.

REASONS FOR GRANTING THE WRIT

Introduction

The instant case meets several of the requirements for review by this Court set forth in Supreme Court Rule 17. The ruling below creates a conflict in the circuits, has decided an important issue of federal procedure which has not been but should be settled by the Court, and reflects a departure from accepted course of judicial review.

Both the Fifth and the Eighth Circuits have held that, however its papers may be styled by plaintiff, a unilateral dismissal by plaintiff prior to the filing of an answer or a motion for summary judgment is a dismissal by notice which cannot be affected by any action of the district court. The decision of the court below in this case conflicts with that conclusion. As a consequence, the court below has misconstrued and misapplied a powerful procedural rule, not yet analyzed by this Court, which was promulgated to promote economic judicial administration and to limit forum shopping and harassment, creating an unwarranted and undesirable gap in the rule.

Further, the court below usurped the fact finding function of the district court by holding that the question of whether petitioner waived reliance on the "two dismissal" rule was a mixed question of law and fact. It is clear, as the district court properly found, that petitioner did not in fact waive reliance of Fed. R. Civ. P. 41(a)(1). Clarification of the proper review role of the appellate court is required.

I.

THE DECISION BELOW DECIDES AN IMPORTANT ISSUE OF FEDERAL PROCEDURE IN A WAY THAT PERMITS A PLAINTIFF, BY USING A LABELING PLOY, TO NULLIFY THE PROVISION OF RULE 41(a)(1) BARRING A THIRD COMPLAINT BY A PARTY WHO HAS VOLUNTARILY DISMISSED THE SAME CLAIM TWICE BEFORE.

The court below held that the district court erred in its construction of Rule 41(a) of the Federal Rules of Civil Procedure when it determined that the dismissal of Abacus in the Judge Moran case operated as an adjudication upon the merits requiring dismissal of Abacus from the instant case.

Rule 41(a) of the Federal Rules of Civil Procedure provides for specific means of dismissing a case and attaches particular consequences to the dismissal depending on when and how the dismissal is effected. In the absence of a written stipulation signed by all parties, a fact not present in this case, a plaintiff has two options. It can, by notice under subdivision 1 of Rule 41(a), obtain a penalty free voluntary dismissal, with the understanding that a second dismissal will be "with prejudice" or, by making an appropriate motion, with notice to defendant, it can apply under subdivision 2 for permission to withdraw, and, after defendant is heard, the court can fashion fair terms for dismissal.

Because the primary purposes of the Rule are to afford a plaintiff reasonable, but reasonably limited, access to a judicial forum, and to prevent harassment of a defendant, *American Cyanamid Co.* v. *McGhee,* 317 F.2d 295, 297 (5th Cir. 1963), *Englehardt* v. *Bell & Howell Co.,* 299 F.2d 480, 483 (8th Cir. 1962), each of a plaintiff's options regarding voluntary dismissal is limited by and dependent on the defendant's degree of responsiveness to the plaintiff's complaint. As the district court below stated in its first opinion, "Fed. R. Civ. P. 41(a) provides for voluntary dismissal by the plaintiff before the defendant has answered or by order of court after defendant has served its answer or motion." In sum, it is not the label plaintiff attaches to its dismissal application, but the circumstances of the case that determines if Rule 41(a)(1) or Rule 41(a)(2) applies.

This analysis of Fed. R. Civ. P. 41(a)(1) is supported by the decisions of two Circuit Courts of Appeals. In *Williams* v. *Ezell*, 531 F.2d 1261 (5th Cir. 1976), the Fifth Circuit considered a pleading entitled "Motion for Dismissal" which sought dismissal without prejudice and was filed prior to defendant's filing any answer or motion for summary judgment. The Appellate Court found the styling of the document as a "Motion for Dismissal" rather than a "Notice of Dismissal" to be a "distinction without a difference." 531 F.2d at 1263. In the absence of any answer or motion for summary judgment, the Fifth Circuit held that the trial court

> had no power or discretion to deny plaintiffs' right to dismiss or to attach any condition or burden to that right. That was the end of the case and the attempt to deny relief on the merits and dismiss with prejudice was void.

531 F.2d at 1264.

The Eighth Circuit reached a similar conclusion in *Gioia* v. *Blue Cross Hospital Service, Inc. of Missouri*, 641 F.2d 540 (8th Cir. 1981), where plaintiff had filed a "Memorandum for Clerk" which somehow was delivered to the judge, who wrote "so ordered" on the paper and signed it, and it was subsequently filed. The trial court in *Gioia* rejected the argument that this procedure amounted to a dismissal by order under Fed. R. Civ. P. 41(a)(2), instead holding that it was a dismissal under 41(a)(1) because, *inter alia*, (1) defendants had not filed an answer or a motion for summary judgment and under the rule plaintiff was entitled as a matter of right to dismiss its complaint, and (2) defendants were given no opportunity to oppose the dismissal. *Gioia*, 641 F.2d at 543. The Eighth Circuit affirmed, holding that

> plaintiff proceeded in a manner which would lead one to believe that dismissal was voluntary and unilateral—no proper motion, no notice, no hearing, no waiting for five days before presenting the matter to the judge in accord with the local rules, and no formal order.

Id. at 544.

See also Sanchez v. *Vaughn Corporation,* 282 F. Supp. 505 506-07 (D. Mass. 1968) (when plaintiffs filed documents in question, no answer, motion for summary judgment, or any other responsive pleading had been filed; thus, effect of document to be determined by Rule 41(a)(i); fact that document captioned "Motion" rather than "Notice" is without legal significance); *Wilson & Co., Inc.* v. *Fremont Cake & Meal Co.,* 83 F. Supp. 900, 903 (D. Neb. 1949). ("That the plaintiff denominated [document dismissing action] a 'motion' does not nullify or alter its actual character. It is its content, not its label, that matters.")

The same result should obtain here. Because Abacus had not filed an answer or a motion for summary judgment, Sutton Place had the unilateral right to dismiss the Judge Moran case and the district court had no power to affect that dismissal. *American Cyanamid Company* v. *McGhee,* 317 F.2d 295, 297 (5th Cir. 1963) ("Rule 41(a)(1) is the shortest and surest route to abort a complaint when it is applicable. So long as plaintiff has not been served with his adversary's answer or motion for summary judgment he need do no more than file a *notice* of dismissal with the Clerk. That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play" (emphasis in original)). Abacus received no notice of the hearing, and Judge Moran perfunctorily signed a minute order confirming the dismissal—an order that had no effect because the district court cannot condition or reject a dismissal under Fed. R. Civ. P. 41(a)(1). *American Cyanamid,* 317 F.2d at 297. Thus, the district court below correctly held that Sutton Place's actions amounted to dismissal by notice under Rule 41(a)(1) and the Seventh Circuit should have affirmed.

II.

THE DECISION BELOW ALSO CONFLICTS WITH DECISIONS OF THE FIFTH AND EIGHTH CIRCUITS HOLDING THAT THE "TWO DISMISSAL" PROVISION OF RULE 41 APPLIES REGARDLESS OF THE LABEL ON THE SECOND DISMISSAL, IF IT IS IN ACTUALITY A VOLUNTARY, UNILATERAL WITHDRAWAL OF THE ACTION BY THE PLAINTIFF AND WAS TAKEN WITHOUT NOTICE TO THE DEFENDANT AND AN OPPORTUNITY TO BE HEARD.

The court below, by stressing form over substance, has taken a position in conflict with decisions of the Fifth and Eighth Circuits in *Ezell* and *Gioia*, respectively. The majority opinion refers to *Gioia*, but totally fails to come to grips with its conclusion. Unlike the Eighth Circuit, the court below failed to recognize a transparent attempt to circumvent the comprehensive approach of Rule 41. The resulting conflict among the Circuits must be resolved.

The reasoning followed by the Eighth Circuit in *Gioia* further illustrates the error made by the Seventh Circuit in this case. The Eighth Circuit reasoned that the second dismissal involved in that case could not have been a valid dismissal under Rule 41(a)(2) because the defendant had not been given any notice or an opportunity to be heard. Further, as no stipulation had been filed with the court, the Eighth Circuit reasoned that the dismissal must have been a voluntary dismissal under Rule 41(a)(1).

Until the decision below, it was clear that Rule 41 provided a *comprehensive* list of the ways in which a civil action could be voluntarily dismissed. *See American Cyanamid*, 317 F.2d at 297 ("Within [Rule 41] there are three separate and distinct methods of voluntarily dismissing a suit"). The Seventh Circuit by its decision added a fourth way: dismissal by *ex parte* motion without notice to the defendant or opportunity to be heard. Such a modification of Rule 41 cannot be allowed to remain.

Rule 41 is designed to limit forum-shopping and harassment of defendants through the continued filing of actions which are subsequently aborted by plaintiffs. *American Cyanamid Co.* v.

McGhee, 317 F.2d 295, 297 (5th Cir. 1963). Were it possible to avoid the result of the two-dismissal rule as easily as obtaining an *ex parte* court order, without notice to defendant, the opportunity for harassment would be unlimited because no intelligent forum-shopping and harassing plaintiff would ever file a notice of dismissal. Indeed, if the construction of Rule 41 by the court below were adopted generally, one of the most powerful rules promulgated to curb abuse would be emasculated. As the district court below found, to "refuse to apply the two dismissal rule because an order dismissed the case would be to permit plaintiffs to circumvent the policy of the rule . . . ."

A simple review of the Sutton Place motion reveals that it was really a notice in disguise:

—it is not directed to Abacus, but, rather to Hon. James B. Moran,

—it does not inform Judge Moran of all the facts, including, especially, the prior dismissal of the same claims in the Illinois case and the pendency of the same claims in Florida,

—it does not seek exercise of the Court's judgment, and

—in ¶ 4, it announces plaintiffs' *election* to voluntarily dismiss the action.

In short, the substance of the motion was the same as if plaintiffs had filed a dismissal notice. Because Abacus had not been served with summons of the complaint and plaintiffs decided to give no notice to Abacus of the motion, Abacus had no opportunity to be heard concerning, for example, the existence of the Florida foreclosure, the related litigation in the Bankruptcy Court and the previous dismissal of the same action in the Illinois case. Judge Moran could not, then, weigh the equities nor consider any terms and conditions to be imposed upon plaintiffs in lieu of dismissing the case with prejudice. Had the existence of those proceedings been brought to Judge Moran's attention, he might well have issued a more restrictive order.

In reversing Judge Marshall, the majority has amended Rule 41(a). By its tacit acceptance of plaintiffs' conduct, it has sanctioned an additional, unwritten and unwarranted avenue for relief. It has effectively declared that even where a defendant has not answered or moved for judgment, merely by casting a notice of dismissal in the form of a motion and seeking a perfunctory order of approval, a plaintiff can gain a second dismissal without either (1) the certainty of the sanction of Rule 41(a)(1), i.e., prejudice and an adjudication on the merits or (2) the safeguard against abuse by the exercise of judicial control under Rule 41(a)(2), i.e., the opportunity for imposition of terms or conditions by a court after an adversary hearing. In departing from the Rule's concern for the posture of a defendant, the majority has deprived Abacus of any and all benefit under Rule 41(a).

III.

THE COURT BELOW USURPED THE FACT FINDING FUNCTION OF THE TRIAL COURT BY HOLDING THAT THE QUESTION OF WHETHER PETITIONER WAIVED RELIANCE ON THE TWO DISMISSAL RULE OF RULE 41 WAS A "MIXED QUESTION OF LAW AND FACT."

The court below also held that Abacus' counsel in related proceedings before the Bankruptcy Court in the Southern District of Florida had waived Abacus' right to object to any new case brought against it on Rule 41 grounds. In addressing the stipulation or waiver issue, the majority erred in two critical respects. First, it misstated the nature of the question to be considered. Second, it overstepped its scope of review.

As Judge Eschbach correctly noted in his dissent, "(a) waiver is a *voluntary* relinquishment of a *known* right." *Sutton Place Development Co.* v. *Abacus Mortgage Inv. Co.*, 826 F.2d 637, 643 (7th Cir. 1987). A stipulation, particularly one that waives rights, must be clearly proved. *Hi-Lo TV Antenna Corp.* v. *Rogers*, 274 F.2d 661, 665 (7th Cir. 1960); *see also, Verret* v. *Elliot Equipment Corp.*, 734 F.2d 235, 237 (5th Cir. 1984); *United States* v. *Campbell*, 351 F.2d 336, 341 (2nd Cir. 1965).

Specifically, "[b]efore a party is deemed to have waived or relinquished a right or remedy available to it under law, a clear and distinct manifestation of such an intent must be found." *American National Bank and Trust Co.* v. *K-Mart Corp.*, 717 F.2d 394, 398 (7th Cir. 1983). The burden of proving the waiver is, of course, on the party asserting it. *Garvy* v. *Blatchford Calf Meal Co.*, 119 F.2d 973, 975 (7th Cir. 1941). In the record of this case, no such clear manifestation can be found.

The majority concedes that Abacus' Florida counsel "did not explicitly waive reliance on the 'two dismissal' rule . . . ." 826 F.2d at 641. Nevertheless, in a footnote, it holds Judge Marshall's finding that Florida counsel's statement was not a waiver to be "clearly erroneous". *Id.* at 641 n.4.

In doing so, the majority erroneously approached the waiver issue as if it were a mixed question of law and fact and, therefore, independently reviewable by the Court. In fact, none of the cases cited by the majority in that footnote concern waiver.[2]

Moreover, what the majority failed to recognize, but what dissenting Judge Eschbach did see (*id.* at 643), was that the trial court's finding on the stipulation or waiver issue was solely a factual one. Indeed, the question of waiver has long been recognized in the Seventh Circuit as one of fact. *See, e.g., Taylor* v. *Orton*, 216 F.2d 62, 64 (7th Cir. 1954); *Universal Gas Co.* v. *Central Ill. Pub. Service Co.*, 102 F.2d 164, 166 (7th Cir. 1939). The same is true in other circuits as well. *See, e.g., Ouimette* v. *E.F. Hutton & Co., Inc.*, 740 F.2d 72 (1st Cir. 1984); *Safer* v. *Perper*, 569 F.2d 87, 99 (D.C. Cir. 1977).

Because the majority concedes that Abacus' Florida counsel "did not explicitly waive reliance on the 'two dismissal' rule," there is no basis for terming as "clearly erroneous" the district court's failure to find waiver. Nowhere in the record before has

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2. See, *Miller* v. *Fenton*, 474 U.S. 104 (1985) (voluntariness of confession); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n. 19 (1982) (intentional discrimination); *Mucha* v. *King*, 792 F.2d 602, 605 (7th Cir. 1986) (termination of bailment and concomitant conversion); *Schuneman* v. *United States*, 783 F.2d 694, 699 (7th Cir. 1986) (evaluation of nature of rental income).

Sutton Place met its burden to show by clear proof a distinct voluntary relinquishment by Abacus of a known right.

As the testimony quoted by the majority reflects, in a bankruptcy proceeding pending in Florida, Abacus' Florida counsel stated he had "no problem with" the dismissal of the Judge Moran case without prejudice to plaintiffs' right to assert claims against Abacus in any then pending litigation, including the case below. The Order entered by the Bankruptcy Court comports with those terms. That Order provided, in pertinent part:

> This Order is without prejudice to debtors' rights, including the assertion of the cause of action stated in the Action [the Judge Moran case], in any litigation which is now pending.

Even a quick perusal of the Bankruptcy Judge's Order shows that it placed no restrictions on Abacus concerning the dismissal of the Judge Moran suit. Moreover, it does not even state that that dismissal shall be "without prejudice." What it does clearly state is that if plaintiffs had any right to pursue their cause of action against Abacus, they could do so. The Order did not create rights for plaintiffs, nor delineate what those rights might be. In this context, the phrase "without prejudice to debtors' rights" can by no stretch of meaning be read as saying "without prejudice and Abacus waives its right to assert the two-dismissal provision of Rule 41."

Rule 41 was not even discussed before Judge Gassen and no waiver can be found in this record. Certainly the parties and Judge Gassen knew how to word a stipulation when one was agreed. For instance, when Sutton Place belatedly wished to add new theories to its Counterclaim in the Florida foreclosure a clear and unambiguous Order was entered directing Abacus to join in and stipulate to a timely motion by Sutton Place. It is for good reason that similar directness is missing from Judge Gassen's Order concerning dismissal of the Judge Moran case. No such stipulation was agreed, and Sutton Place made no mention of any such stipulation when it moved to dismiss the Judge Moran case. Such a stipulation, presented to Judge Moran, would have

removed that dismissal from the ambit of the two dismissal provision of Rule 41(a)(1). Fed. R. Civ. P. 41(a)(1)(ii).

With plaintiffs having the burden of proving Abacus' waiver of rights, on the record as presented, the district court was amply justified in finding that such a waiver was "far from clear." Judge Eschbach, in dissent, agreed. Cognizant of the guidelines of appellate restraint, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), *United States* v. *Friedman*, 739 F.2d 252, 255 (7th Cir. 1984) (court of appeals may not reweigh evidence); *cf.*, *DePass* v. *United States*, 721 F.2d 203, 205 (7th Cir. 1983) (under Rule 52(a), appellate court may only set aside findings of a district court when those findings are clearly erroneous), he deferred to the trier of fact.

CONCLUSION

In his dissent, Judge Eschbach suggests the majority seeks "to right a perceived inequity . . . ." 826 F.2d at 643. Elsewhere, the majority stresses the importance of administering justice through trials, not summary dispositions. 826 F.2d at 640. Thus, the fundamental rationale for the majority opinion, the assumption underlying its unusual emendation of Rule 41 as well as its disregard for the constraint on appellate review is simply that the result ordained here by Rule 41 is too harsh, and plaintiffs must have their day in court in the interest of fairness and expedition. 826 F.2d at 640. Neither is achieved nor encouraged by the majority opinion.

Rather, the history of this case is a litany of complex and convoluted efforts by plaintiffs to avoid an adjudication on the merits. The majority seems to have forgotten that plaintiffs' claims were set for a trial to commence over four years ago when plaintiffs decided not to proceed. So much for expedition.

The majority also seems to have forgotten that Abacus over the last four-plus years has been continually thrust into litigation alternatively, and sometimes simultaneously, in the state courts in Illinois and Florida, the Bankruptcy Court in Florida and two different federal courtrooms in Chicago, Illinois. Even after

plaintiffs dismissed the Judge Moran case and three weeks later filed an amended complaint before Judge Marshall, naming Abacus, and alleging for at least the fourth time the same claims, they were not finished. They subsequently decided to return to the Broward County courthouse to attempt to amend their counterclaim in the Florida foreclosure. So much for fairness.

In light of this history, the majority conclusion that Abacus has not been harassed is without foundation. Nor need the Court feel sorry for plaintiffs. If the consequence of their misdeeds is to close the doors of this courthouse to their claims against Abacus, they have only themselves to blame. Such a consequence follows only from plaintiffs own failure to pursue all of their theories at one time in one place. It is a result of certain choices plaintiffs alone have made. Those choices include 1) the decision to bring certain causes of action to Illinois instead of raising all of their claims in the Florida foreclosure, as could have and should have been done; 2) the decision to dismiss Abacus voluntarily from the Illinois state case instead of moving to transfer the matter away from the Circuit Court of Cook County or removing the case to the Bankruptcy Court, as Judge Marshall found to have been viable alternatives; 3) the decision not to make Abacus a party defendant in the instant case initially, but instead to file the Judge Moran case; and 4) the decision to dismiss the Judge Moran case instead of moving to consolidate it with the instant case, an option considered by plaintiffs' counsel, but rejected. There is, quite simply, no excuse for this constant, continuous pattern of litigation churning or for clogging the courts with its residue.

Rule 41 provides plaintiffs with not just one day in court, but two days. Plaintiffs here have had their two days and more. That is enough, more than enough. To review and settle an important issue of federal procedure, to bring the opinion of the court below in conformity with those of the Fifth and Eighth Circuits, to reaffirm the limited nature of a review of a factual determination and in the interest of justice and the expeditious and inexpensive resolution of litigation, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

[826 F.2d 637 (7th Cir. 1987)]

SUTTON PLACE DEVELOPMENT COMPANY,
a Florida corporation, Henry Weiss and Carol Weiss
Plaintiffs-Appellants,

v.

ABACUS MORTGAGE INVESTMENT COMPANY,
Defendant-Appellee.

No. 85-2633.
United States Court of Appeals,
Seventh Circuit.

Argued April 2, 1986.

Decided Aug. 12, 1987.

Rehearing and Rehearing En Banc
Denied Oct. 22, 1987.

Following plaintiffs' voluntary dismissal of its second action against defendant, plaintiffs added claim against defendant in separate, pending litigation. The United States District Court for the Northern District of Illinois, Prentice H. Marshall, J., dismissed complaint against defendant based upon "two dismissal" rule, and plaintiffs appealed. The Court of Appeals, Ripple, Circuit Judge, held that "two dismissal" rule was not applicable where second dismissal was made by motion and granted by court order, rather than by notice.

Reversed and remanded.

Eschbach, Senior Circuit Judge, dissented and filed opinion.

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"Two dismissal" rule was not applicable where second dismissal was made by motion and granted by court order, rather than by notice; circumstances did not warrant disregarding of plain

language of rule where it was clear that plaintiffs were not seeking dismissal in prior action in order to harass defendant, but rather to consolidate action against defendant with other litigation. Fed.Rules Civ.Proc.Rule 41(a)(1,2), 28 U.S.C.A.

Stephen P. Sinnott, Sinnott & Kromelow, Chicago, Ill., for plaintiffs-appellants.

Robert L. Price, D'Ancona & Pflaum, Chicago, Ill., for defendant-appellee.

Before CUDAHY and RIPPLE, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

RIPPLE, Circuit Judge.

In this case, we are asked to determine whether the district court correctly applied the so-called "two dismissal" rule of Fed.R.Civ.P. 41(a)(1)[1] in the rather atypical situation

[826 F.2d 638]

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1. Fed.R.Civ.P. 41 provides, in pertinent part:

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim* [emphasis supplied].

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

presented by this litigation. Because we respectfully disagree with the decision of the district court, we reverse its judgment and remand the case for further proceedings.

I

A. *Background*

The plaintiffs-appellants, Sutton Place Development Company and its principals, Henry and Carol Weiss (collectively referred to as Sutton Place) were involved in the development of a residential condominium in Coral Springs, Florida. The defendant-appellee, Abacus Mortgage Investment Company (Abacus), was one of the companies financing the development of the project. When the project faltered, Abacus served Sutton Place with a notice of default.

B. *Subsequent Litigation*

1. Illinois Civil Action

Sutton Place reacted to the notice of default by commencing an action in the Illinois state courts. It obtained a temporary restraining order preventing Abacus from proceeding with a foreclosure action; this order was later dissolved. Sutton Place also filed claims for damages against the various defendants, including Abacus. After a change of attorneys, Sutton Place sought a continuance of this action. When the trial judge denied the continuance, Sutton Place, on July 28, 1983, voluntarily dismissed this action as to Abacus.

2. The Florida Foreclosure Action

Once the restraining order in the Illinois action was lifted, Abacus filed its foreclosure action in the Circuit Court of Broward County, Florida. Sutton Place filed a counterclaim alleging wrongdoing similar to that alleged in the Illinois action.

3. The Present Case—Initial Complaint ("Marshall Case")

On July 21, 1983, a week before Abacus was dismissed from the Illinois state case, Sutton Place filed this case in the United States District Court for the Northern District of Illinois. This case was assigned to Judge Marshall. Abacus was *not* named as a defendant in the original complaint. The defendants were three individuals who had been involved in the financing of the condominium. Two of the three were defendants in the Illinois state court action.

4. Bankruptcy Proceedings

On August 1, 1983, Sutton Place filed petitions under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.* (1982). Under the automatic stay provisions of the Bankruptcy Code, *see* 11 U.S.C. § 362(a), this filing suspended actions brought against Sutton Place by its creditors.

5. New Federal Litigation Against Abacus ("Moran Case")

On December 21, 1983, Sutton Place filed a breach of contract case against Abacus alone. This case was assigned to Judge Moran.

C. *The "Two Dismissal" Problem Emerges*

In the bankruptcy proceeding, Abacus obtained an order directing Sutton Place to abate the Moran Case on the ground it was filed without the permission of the bankruptcy court. Sutton Place then asked that this order be modified so that it could dismiss the Moran Case and refile the claim against Abacus in one of the other suits. Abacus agreed not to oppose the motion provided the order state that the modification was for the purpose of dismissing the Moran Case. Sutton Place insisted that the order state it was without prejudice. The following colloquy then took place before the bankruptcy judge:

The Court: How about dismissing it without prejudice to asserting the same

[826 F.2d 639]

cause or causes of action in the presently existing lawsuits?

Mr. Neirenberg [Counsel for Sutton Place]: I have no problem with that.

Mr. Pollack [Counsel for Abacus]: Neither do I.

R.134, Ex. 1 at 11-12. Accordingly, the bankruptcy judge entered the following order:

> IT IS ORDERED that this Court's Order of January 17, 1984 directing debtors to abate their action (the "Action") [referring to the Moran Case] . . . is vacated solely to enable debtors to dismiss the Action. This Order is without prejudice to debtors' rights including the assertion of the cause of action stated in the Action, in any litigation which is now pending.[2]

R. 129, Ex. 3 at 1-2.

Sutton Place then filed a motion for voluntary dismissal before Judge Moran:

> NOW COME the plaintiffs, by their attorneys, and move this Court to voluntarily dismiss this action without prejudice, and in support state as follows:
>
> 1. The complaint in this action against the defendant ABACUS MORTGAGE INVESTMENT COMPANY, was filed on December 21, 1983.
> 2. Service has not been obtained on the defendant.
> 3. The defendant has not appeared or otherwise pleaded in this action.
> 4. The plaintiffs elect to voluntarily dismiss this action against the defendant without prejudice.
>
> WHEREFORE, the plaintiffs ask this court to enter an order dismissing this case without prejudice.

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2. It is not clear whether the bankruptcy judge, at the time he entered the order, was specifically aware of the earlier dismissal of the Illinois state court action.

Id., Ex. 4 at 1. Abacus had no notice of the motion, other than that which it had by virtue of its counsel's participation in the bankruptcy hearing.

On May 3, 1984, Judge Moran entered an order in his minute book granting the motion: "Plaintiffs' motion to voluntarily dismiss this action without prejudice is granted." *Id.*, Ex. 5.

On May 22, 1984, Sutton Place amended its complaint in the Marshall Case to add Abacus as a defendant. On July 5, 1984, Abacus moved to dismiss the complaint. Among the grounds asserted was the "two dismissal" rule.

D. *The Decision of the District Court*

Judge Marshall dismissed the complaint against Abacus on the ground that the dismissal by Judge Moran was, because of the "two dismissal" rule of Rule 41(a), a decision on the merits which barred further litigation. He noted:

> In all three claims, the same loan documents, parties to the loan transactions, and property are the same. In all three actions, plaintiffs alleged that Abacus wrongfully required plaintiffs to acquire a parcel of land referred to as the Vandia property as a condition to the loan, wrongfully refused promised funding, and wrongfully instituted a foreclosure action against plaintiffs' property. Because the claim is the same against Abacus, rule 41(a) requires dismissal.

Sutton Place Dev. Co. v. *Abacus Mortgage Inv. Co.*, No. 83 C 5020, mem. op. at 3-4 (N.D.Ill. Feb. 25, 1985); R. 123 at 3-4 [hereinafter cited as Mem. op.].

Judge Marshall noted that Judge Moran's form of dismissal was an order rather than a notice of dismissal. However, he believed the "two dismissal" rule was still applicable because:

> the plaintiffs achieved what a notice of dismissal would have accomplished. To refuse to apply the two dismissal rule because an order dismissed the case would be to permit plaintiffs to circumvent the policy of the rule by moving to dismiss rather than simply filing a notice of dismissal as the rule provides.

Id. at 3.

When asked to reconsider his ruling, the court refused to characterize Abacus' counsel's consent to lift the bankruptcy abatement order as a waiver of the "two dismissal" rule. He pointed out that:

[826 F.2d 640]

> At the time plaintiffs appeared before the bankruptcy court to modify the order of abatement, they recognized that an alternate procedural course of action was available to them, namely a motion to consolidate and transfer. They freely chose what they perceived to be the better technique of simply dismissing the action pending before Judge Moran and then amending the complaint in this action to add Abacus as a party defendant.

R. 143 at 3.

II

We begin our analysis, as we must, with the language of Rule 41(a). There is no question that, if this case were decided according to the precise language of Fed.R.Civ.P. 41(a)(1), the action of the district court in dismissing the appellant's case could not stand. "By its own clear terms the 'two dismissal' rule applies only when the second dismissal is by notice under Rule 41(a)(1). It does not apply to a dismissal by stipulation nor to an involuntary dismissal nor to dismissal by court order under Rule 41(a)(2)." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2368, at 188 (1971) (footnotes omitted) [hereinafter cited as Wright & Miller]. Here, application for the second dismissal was made by motion and granted by order of Judge Moran. Therefore the language of the rule does not trigger the so-called "two dismissal" exemption upon which the district court relied.

We agree with the district court that there are circumstances when due regard for the underlying policy concerns of the Rule may require that the court depart from the precise language of the Rule. *See, e.g., Gioia* v. *Blue Cross Hosp. Serv., Inc.*, 641

F.2d 540 (8th Cir.1981) (although dismissal granted by court order, totality of circumstances established that dismissal was pursuant to Rule 41(a)(1) rather than 41(a)(2)). However, it must be remembered that the federal rules are carefully-crafted instruments designed to achieve, by their uniform application, fairness and expedition in the conduct of federal litigation. Therefore, when a party contends that a court should disregard the express language of a carefully-drawn rule of procedure, that party bears a heavy burden of showing that a departure from the plain language is justified. That burden is especially heavy in the case of the "two dismissal" rule because, by disregarding the plain wording of the rule, the court also disregards the over-arching policy concern of the Federal Rules in favor of a decision on the merits. "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion." *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373, 86 S.Ct. 845, 851, 15 L.Ed.2d. 807 (1966). Moreover, as Judge Meskill pointed out for the Second Circuit in *Poloron Prod., Inc.* v. *Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012 (2d Cir. 1976), "[t]he 'two dismissal' rule is an exception to the general principle, contained in Rule 41(a)(1) and honored in equity prior to the adoption of the Federal Rules, that a voluntary dismissal of an action does not bar a new suit based upon the same claim." *Id.* at 1017 (citation omitted). We should be especially careful not to extend the scope of such a narrow exception when the purpose for the exception would not be served.[3]

The purpose of the "two dismissal" rule, "pointed out in numerous decisions, is to prevent unreasonable abuse and harassment," *American Cyanamid Co.* v. *McGhee*, 317 F.2d 295, 297

3. Indeed, in *Poloron Prod., Inc.* v. *Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (2d Cir.1976), the Second Circuit suggested that "[w]here the purpose behind the 'two dismissal' exception would not appear to be served by its literal application, and where that application's effect would be to close the courthouse doors to an otherwise proper litigant, a court should be most careful not to construe or apply the exception too broadly."

(5th Cir.1963), "by plaintiff securing numerous dismissals without prejudice." Wright & Miller § 2368, at 187 (footnote omitted). The orders of the district court in this case, when evaluated in light of this purpose, simply do not provide an adequate basis for deviation from the plain wording of the rule. The record makes it quite clear that dismissal of the suit before Judge Moran

[826 F.2d 641]

was sought only after the matter had been discussed fully before the bankruptcy judge and opposing counsel. It was clear to all that Sutton Place was seeking dismissal of the suit before Judge Moran—not to harass Abacus but to consolidate its Chicago-based litigation. The bankruptcy judge summarized the understanding of all concerned as follows:

> THE COURT: I am willing, and Mr. Pollack [Abacus' Florida counsel] has no problem, and Mr. Farrar has no problem, with granting the motion to vacate the order, which will permit you to dismiss the case referred to in your motion and in that order, and it is without prejudice to your asserting the cause or causes of action in any presently pending litigation, but not to start a new lawsuit.

R. 134, Ex. 1 at 11-12.

While appellee's counsel did not explicitly waive reliance on the "two dismissal" rule,[4] it is clear that he understood the reason for

4. The district court wrote: "We would not characterize Pollack's statements at the April 18, 1984 hearing as a waiver of Abacus' right to raise the two dismissal rule as a defense in this action. . . ." *Sutton Place Dev. Co.* v. *Abacus Mortgage Inv. Co.*, No. 83 C 5020, mem. op. at 3 (N.D.Ill. Sept. 10, 1985); R.143 at 3. When read in context, it is clear that this statement is the district court's evaluation of the legal significance of counsel's statements. Whatever may be the proper standard of review for such a mixed question of law and fact, *compare Schuneman* v. *United States*, 783 F.2d 694, 699 (7th Cir. 1986) (mixed questions of law and fact "are independently reviewable by an appellate court") (Eschbach, J.) *with Mucha* v. *King*, 792 F.2d 602, 605 (7th Cir.1986) (trial judge has responsibility of "determining not only the historical events that are relevant to how the case should be decided but also the legal significance of those events") (Posner, J.), this conclusory statement is clearly erroneous. *See generally Miller* v. *Fenton*, 474 U.S. 104, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n. 19, 102 S.Ct. 1781, 1790-91 n. 19, 72 L.Ed.2d 66 (1982). As the discussion in the text notes,

the appellants' course of action and raised no objection to it. This is hardly the action of a harassed litigant; it certainly affords no justification for deviating from the plain meaning of Rule 41(a)(1) in order to vindicate the Rule's underlying policy concerns.

Conclusion

Because we believe that the particular fact situation presented by this case does not justify a deviation from the plain wording of Rule 41(a), we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

It Is So Ordered

ESCHBACH, *Senior Circuit Judge*, dissenting.

The sole issue in this appeal is whether a paper styled a "motion" for voluntary dismissal was in reality a "notice" of dismissal, triggering the bar of the "two dismissal" rule contained in Fed.R.Civ.P. 41(a)(1). Because I believe that the majority has assumed away this issue, because I believe the issue is a factual one, and because I believe the finding of the experienced trial judge on this issue was not clearly erroneous, I must dissent.

I am in complete agreement with the majority's statement of the general rule that "[b]y its own clear terms the 'two dismissal' rule applies only when the second dismissal is by notice under Rule 41(a)(1)." 9 Wright & Miller, *Federal Practice and Procedure* ¶ 2368 at 188(1971). The Rule does not apply where the dismissal is by stipulation or upon motion. However, whether the second dismissal was by motion is precisely what is at issue in this case. The district court found that:

> Although the form of the dismissal was an order of a notice of dismissal, the plaintiffs achieved what a notice of dismissal would have accomplished. To refuse to apply the two dismissal rule because an order dismissed the case

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counsel for the appellee was quite aware of the appellants' course of action and the reasons for it and represented to the bankruptcy court that he would not object.

> would be to permit plaintiffs to circumvent the policy of the rule by moving to dismiss rather than simply filing a notice of dismissal as the rule provides.

Slip op. at 3.

Thus, Judge Marshall held, in effect, that plaintiffs' "motion" *was* a notice of dismissal.

[826 F.2d 642]

I cannot say that he clearly erred in this conclusion.

Labels do not control the effect of filings with the court. *United States* v. *1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984) (treating "notice for rehearing and stay of execution, condemnation and forfeiture" as Rule 60 motion for relief from judgment); *see also* Fed.R.Civ.P. 8(c) (Improperly designated counter-claim to be treated as if properly designated); Fed.R.Civ.P. 8(f) (pleadings construed so as to do substantial justice). But for the label, plaintiffs' "motion" had all the earmarks of a voluntary notice of dismissal. The defendant had not filed either an answer or a motion for summary judgment. Thus a voluntary notice of dismissal was clearly permitted. The defendants were not given notice of the motion. Thus, there was no opportunity for Judge Moran to consider whether to attach "terms and conditions" to the order as contemplated by Rule 41(a)(2). In sum, the district court was correct in concluding that the plaintiffs "achieved what a notice of dismissal would have accomplished." In essence, this was the procedure they followed.

This conclusion is supported by what little case law exists on the issue of whether a particular filing is a notice of dismissal. In *Gioia* v. *Blue Cross Hospital Services*, 641 F.2d 540 (8th Cir.1981), the Eighth Circuit was presented with a similar situation. There, the plaintiff, having once dismissed its suit and refiled, filed a document entitled "Memorandum for Clerk" which stated:

> Comes now the plaintiff . . . and by leave of Court, dismisses its complaint . . . without prejudice at plaintiff's cost.

The judge in the case wrote "So ordered" on the side of the memorandum, and a copy of it was mailed to the defendant, who had earlier been notified by letter of the plaintiff's intention to dismiss the suit in order to bring a new suit with additional parties.

When the defendant invoked the two dismissal rule in the subsequent suit, the district court found that the second dismissal was not by order of the court, but rather by notice. The district court supported its decision by noting that there had been no answer or motion for summary judgment, that the defendants were given no opportunity to oppose the dismissal, and that the defendants had been put to considerable time and expense—one of the reasons Rule 41(a)(1) was adopted. 641 F.2d at 543. Under these circumstances, the Eighth Circuit held that:

> All in all, we cannot fault the logic of [the district judge] who found that the dismissal was *not* by court order.... The plaintiff proceeded in a manner which would lead one to believe that the dismissal was voluntary and unilateral—no proper motion, no notice, no hearing, no waiting for five days before presenting the matter to the judge in accord with the local rules, and no formal order. And, finally, no indication that they believed the court had any discretion in the matter since their third suit was filed before they ever "applied" for dismissal of the second.

641 F.2d at 544 (emphasis in original).

In another context, the Fifth Circuit has held that the fact that a particular filing is labeled a "motion" rather than a notice is a "distinction without a difference." *Williams* v. *Ezell*, 531 F.2d 1261 (5th Cir. 1976). In that case, the district court had denied a plaintiffs' "motion" for voluntary dismissal without prejudice and entered an order which would have dismissed the matter with prejudice unless the plaintiffs paid the defendant's attorney's fees, although there had not been a prior dismissal of the action. The Fifth Circuit reversed, holding that, because the "motion" was in reality a notice, the district court had no discretion to deny it or to attach conditions to the dismissal. 531 F.2d at 1264.

While this case is not factually identical to those cited above, it is sufficiently similar that I would find the reasoning of the Fifth and Eighth Circuits persuasive here. Of particular significance are the lack of notice to Abacus and the perfunctory consideration that Judge Moran was expected to and did give the motion. As in *Gioia*, plaintiffs' behavior in this case did not indicate that they believed Judge Moran had

[826 F.2d 643]

any discretion at all with regard to their purported "motion." Thus, I believe there was no error in treating the "motion" as what it was for all practical purposes a notice which triggered the two dismissal rule.

Contrary to the majority's suggestion, I do not believe either the Eighth Circuit or the Fifth Circuit was crafting a judicial version of Rule 41 to fill in the gap left by the rule itself. Assuming such power to even exist at all (which I doubt), I agree with the majority that it ought to be used sparingly. However, only by blithely assuming that, because the label on the piece of paper plaintiffs filed read "motion", it must be one, does the majority even raise the spectre of such unrestrained judicial power. What the district judge did was to examine the factual situation before him and determine from long years of practical experience at the trial level whether the facts fit one or the other subdivision of Rule 41. True, it applied a "substance over form" analysis, but as indicated above, I believe this was entirely proper.

While I find the issue regarding the purported "stipulation" or "waiver" more difficult, I believe that the district court's finding on this issue was one of fact, which we should not disturb on appeal unless we find that it is "clearly erroneous." *See* Fed.R.Civ.P. 52(a).

Unlike the majority, I am unable to so conclude. Plaintiffs, as the parties asserting waiver, had the burden of proving it. *Garvy v. Blatchford Calf Meal Co.*, 119 F.2d 973 (7th Cir.1941). But the portion of the transcript which was relied upon by Sutton Place to establish waiver, and which was reviewed by the district court, was ambiguous. As the district court noted, during the

bankruptcy hearing there had been references to a least five pending lawsuits. Neither of the parties mentioned the two dismissal rule, and so far as the record shows, neither was aware of either the rule or its application at the time of the hearing before the bankruptcy judge. A waiver is a *voluntary* relinquishment of a *known* right. *Pastrana* v. *Federal Mogul Corp.*, 683 F.2d 236 (7th Cir. 1982); *Universal Gas Co.* v. *Central Illinois Public Service Co.*, 102 F.2d 164 (7th Cir.1939). As the district judge found, any waiver of the two dismissal rule is "far from clear" on this record.

While I might, were we deciding the matter in the first instance, conclude that the oral agreement that dismissal of the Moran case be "without prejudice" to refiling the claims therein in another lawsuit was meant to be a waiver of the two dismissal rule, I do not believe we can say that the contrary finding of the district court was "clearly erroneous."

Where fact-bound issues relating to the meaning of filings in the district court are concerned, we ought to be particularly careful of second-guessing an experienced trial judge who must decide such questions daily. Because I believe the majority has, to right a perceived inequity, abandoned the ordinarily deferential standard of review we apply to this type of case, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUTTON PLACE DEVELOPMENT CO., etc., et al., *Plaintiffs,* v. HAROLD GREEN, et al., *Defendants.*	83 C 5020

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge:

Plaintiffs allege that the defendants defrauded them in connection with a loan made by defendant, the Bank of Commerce and Industry (BCI), to plaintiffs. The complaint alleges that the fraudulent acts committed by defendants constitute a pattern of racketeering activity and that defendants conducted BCI's affairs through fraudulent activities violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1976). Defendant Abacus has moved to dismiss upon various grounds, including the two dismissal rule under Fed. R. Civ. P. 41(a), which provides:

> Subject to the provisions of Rule 23(e), of Rule 66 and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Plaintiffs have filed two lawsuits against Abacus based upon its conduct in connection with the loan in question here. The first action was filed in the Chancery Division of the Circuit Court of Cook County, Illinois, No. 83 CH 219. Plaintiffs voluntarily dismissed the suit in the Illinois court before Abacus had been served with the complaint. Plaintiff then sued Abacus in the United States District Court for this district, No. 83 C 9368. The case was assigned to Judge Moran. Before service on Abacus, plaintiff filed a motion to dismiss voluntarily. Judge Moran ordered the case dismissed on May 3, 1984. On May 22, 1984 plaintiffs moved to amend the complaint to add Abacus as a defendant here.

Abacus argues that the dismissals of the earlier two actions bar plaintiff from proceeding against Abacus here. Plaintiffs argue that since their case before Judge Moran was dismissed by order of court rather than by stipulation or notice of dismissal, the two dismissal rule of 41(a) does not apply. Also, plaintiffs argue that their earlier lawsuits did not involve the same claims as that now before us.

Fed. R. Civ. P. 41(a) provides for voluntary dismissal by the plaintiff before the defendant has served its answer or motion for summary judgment or by order of court after defendant has served its answer or motion. The double dismissal rule applies to the former type of dismissal.

In the case before Judge Moran, plaintiffs did not follow the procedure prescribed by Fed. R. Civ. P. 41. Rather, without giving notice to defendant, plaintiff filed a motion before Judge Moran for dismissal. Although the form of the dismissal was an order instead of a notice of dismissal, the plaintiffs achieved what a notice of dismissal would have accomplished. To refuse to apply the two dismissal rule because an order dismissed the case would be to permit plaintiffs to circumvent the policy of the rule by moving to dismiss rather than simply filing a notice of dismissal as the rule provides.

Accordingly, dismissal of plaintiffs' claims against Abacus is required if this action is "based upon the same claim." Fed. R.

Civ. P. 41(a). In all three claims, the same loan documents, parties to the loan transactions, and property are the same. In all three actions, plaintiffs alleged that Abacus wrongfully required plaintiffs to acquire a parcel of land referred to as the Vandia property as a condition to the loan, wrongfully refused promised funding, and wrongfully instituted a foreclosure action against plaintiffs' property. Because the claim is the same against Abacus, rule 41(a) requires dismissal.

The motion of defendant Abacus Mortgage Investment Co. to dismiss is granted and the action as to Abacus is dismissed with prejudice.

ENTER:

.....
Prentice H. Marshall
District Judge

DATED: 2-25-85

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUTTON PLACE DEVELOPMENT COMPANY, a Florida corporation, HENRY WEISS and CAROL WEISS,
Plaintiffs,

v.

HAROLD GREEN, DONALD HOUDER, BERNARD GRIZAFFI, BANK OF COMMERCE AND INDUSTRY, and CORAM, LTD.
Defendants.

No. 83 C 5020

MEMORANDUM OPINION

Prentice H. Marshall, District Judge

Plaintiffs ask us to reconsider our decision of February 25, 1985 dismissing Abacus Mortgage Investment Company (Abacus) as a party defendant. That decision applied the double dismissal rule of Rule 41(a), Fed. R. Civ. P.

Plaintiffs first argue that the two dismissal rule should not have been applied here because their dismissal of the case before Judge Moran was not voluntary. They assert that they were directed to dismiss that action by the United States Bankruptcy Court for the Southern District of Florida.

To say that the bankruptcy court *directed* plaintiffs to dismiss the action pending before Judge Moran is to engage in mischaracterization. On January 17, 1984 the bankruptcy court ordered Sutton Place Development Company and the Weisses to abate their action pending before Judge Moran. This order was modified on April 20, 1984 at plaintiffs' request "to enable debtors to dismiss the Action." *In Re: Sutton Place Development Co., et al.*, Nos. 83-01417-BKC-JAG, 83-01419-BKC-JAG

(Bankr. S.D. Fl. April 20, 1984). The record is clear that plaintiffs dismissed their second complaint against Abacus as part of their strategy to pursue the litigation in Chicago.

Plaintiff's second argument, raised in its reply, is that Abacus is equitably estopped from seeking application of the two dismissal rule by its counsel's agreement to the dismissal without prejudice of the action pending before Judge Moran. Mr. Pollack, Abacus' Florida counsel, stated that he had no problem with dismissing the action before Judge Moran without prejudice to asserting the same cause or causes of action in the presently existing lawsuits. The transcript of the hearing conducted by the bankruptcy court on April 18, 1984 contains references to at least five existing actions, three of which were pending in Chicago. The Chicago actions included the action before Judge Moran, this RICO action, and a cross-claim against Abacus filed by the Bank of Commerce and Industry as an adversary proceeding in the bankruptcy court. The problem with plaintiffs' argument is that it is far from clear that Abacus' counsel was agreeing to a waiver of the double dismissal rule.

"The doctrine of equitable estoppel precludes a litigant from asserting a claim or defense which might otherwise be available to him against another party who has detrimentally altered her position in reliance on the former's misrepresentation or failure to disclose some material fact." *Portmann* v. *United States*, 674 F. 2d 1155, 1159 (7th Cir. 1982). We would not characterize Pollack's statements at the April 18, 1984 hearing as a waiver of Abacus' right to raise the two dismissal rule as a defense in this action; nor can his statements be said to be misrepresentations or the failure to disclose some material fact. Plaintiffs have not shown that they altered their position because of Pollack's statements. At the time plaintiffs appeared before the bankruptcy court to modify the order of abatement, they recognized that an alternate procedural course of action was available to them, namely a motion to consolidate and transfer. They freely chose

what they perceived to be the better technique of simply dismissing the action pending before Judge Moran and then amending the complaint in this action to add Abacus as a party defendant.

Finally, plaintiffs urge us to consider their motives in dismissing the first action they filed in the Circuit Court of Cook County, Chancery Division. They state they dismissed that action against Abacus and filed Chapter 11 proceedings because they had reason to believe they would not receive a fair trial before Judge Holzer. They point to the subsequent indictment of Judge Holzer to support this claim.

Plaintiffs' argument does not ring true. Plaintiffs elected to dismiss Abacus as a party defendant in their Illinois state court action on July 28, 1983. They could not dismiss the entire action because of counterclaims by certain of the defendants. And on August 1, 1983 plaintiffs filed Chapter 11 petitions which resulted in an automatic stay of the proceedings before Judge Holzer. Defendants note that other procedural steps were available to plaintiffs at the time. One possible motion, not made by plaintiffs, was a motion to transfer the case to the Law Division. Transfer of the action was possible because the claims remaining sought only monetary damages. A second possible course of action would have been a motion asking Judge Holzer to recuse himself from the case. The procedural history of the state court action belies plaintiffs' latest argument.

Plaintiffs' motion to reconsider the dismissal of Abacus Mortgage Investment Company as a party defendant is denied. Final pretrial materials to be filed February 15, 1986; pretrial conference March 13, 1986 at 4:30 p.m.; trial date of April 21, 1986 to stand.

ENTER:

.....
Prentice H. Marshall
District Judge

DATED: September 10, 1985.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUTTON PLACE DEVELOPMENT CO., a Florida corporation, HENRY WEISS and CAROL WEISS *Plaintiffs* vs. ABACUS MORTGAGE INVESTMENT COMPANY, a Delaware corporation *Defendant*	No. 83 C 9368 Judge Moran

MOTION TO VOLUNTARILY DISMISS

NOW COME the plaintiffs, by their attorneys, and move this Court to voluntarily dismiss this action without prejudice, and in support state as follows:

1. The complaint in this action against the defendant, ABACUS MORTGAGE INVESTMENT COMPANY, was filed on December 21, 1983.

2. Service has not been obtained on the defendant.

3. The defendant has not appeared or otherwise pleaded in this action.

4. The plaintiffs elect to voluntarily dismiss this action against the defendant without prejudice.

WHEREFORE, the plaintiffs ask this Court to enter an order dismissing this case without prejudice.

SUTTON PLACE DEVELOPMENT CO.,
HENRY WEISS and CAROL WEISS

By: .....
One of Their Attorneys

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUTTON PLACE DEVELOPMENT CO., a Florida corporation, HENRY WEISS and CAROL WEISS *Plaintiffs* vs. ABACUS MORTGAGE INVESTMENT COMPANY, a Delaware corporation *Defendant*	No. 83 C 9368 Judge Moran

NOTICE OF MOTION

To: Honorable James B. Moran
219 S. Dearborn
Room 2341
Chicago, Illinois 60604

On Thursday, May 3, 1984, at 9:30 a.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable James B. Moran, Room 2341, 219 S. Dearborn Street, Chicago, Illinois, and then and there present the attached Motion to Voluntarily Dismiss.

.....
One of The Plaintiffs' Attorneys

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